UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	**No 4:11-CV-77 RWS**
AMEREN MISSOURI,	)	
	)	
Defendant.	)	

MOTION HEARING
BEFORE THE HONORABLE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE
DECEMBER 19, 2012

APPEARANCES:

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Appearances Continued on Page 2

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PRODUCED BY COURT REPORTER COMPUTER-AIDED TRANSCRIPTION

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(PROCEEDINGS BEGAN AT 2:05 PM)

THE COURT: Good afternoon. We are here today in the case styled United States of America against Ameren Missouri, Cause No. 4:11-CV-77. Would counsel make their appearances, please?

MR. LAY: Your Honor, Andrew Lay for the United States. With me at counsel table is Alex Chen from the EPA, and Michael Cooney and Andrew Hanson from the U.S. Department of Justice in DC.

MR. HARLAN: David Harlan for Ameren. Ron Safer and Matt Mock from Schiff Hardin for Ameren.

THE COURT: Very good. We are here today on Ameren's motions to compel. Are there any announcements before we begin? In other words, have any of the issues been narrowed?

MR. SAFER: No, Your Honor.

THE COURT: All right.

MR. SAFER: Afternoon, Your Honor.

THE COURT: Afternoon.

MR. SAFER: I will be discussing the emissions motion to compel. In that regard, we seek two categories of information. The first is the emissions calculations that the government performed as the basis for its allegations that these projects caused an emissions increase, so those existing actual emissions calculations. And the second is the methodology that they intend to use in this case to arrive at

the emissions calculation that they are going to urge upon the Court and the jury.

Whether Ameren should have anticipated an emissions increase after these projects is identified in this complaint as the key issue in this case. The government contends that before each of these projects -- so, that is, before 2001, before 2003, before 2007, and before 2010 -- Ameren should have performed an emissions calculation for each project and that that emissions calculation would have shown Ameren that there would be an increase in emissions from these projects.

The methodology to those calculations are found nowhere in any statute, any rule, any regulation, any guidance by the government whatsoever. The government has made such a calculation for each project before bringing this lawsuit, and the government has admitted that those calculations were the foundation for the allegations in the complaint, indeed for the filing of the complaint.

During the hearing on the FOIA issue when the court was discussing the lack of any guidance in the regulations as to how these calculations should be made, Judge Fleissig asked the government, quote, "Why shouldn't Ameren be able to learn why you have decided that it is the subject to a notice of violation?"

Mr. Lay responded for the Government, quote, "From the Government's perspective, Ameren is learning that through

the Clean Air Act litigation."

So it's not in a regulation. It's not in a statute.

THE COURT: Aren't you trying to prove too much here? I mean, there is, you're absolutely correct, no formula in the regulations, no precise requirement, but it was an obligation of the defendant to make a reasonable estimate, right?

MR. SAFER: Not a numeric calculation, no, Your Honor.

THE COURT: No. I mean, I know there is no formula anywhere, there's no magic formula this is what you have to do, but you have to take a measure of what you're about to do and if it's going to have a significant impact, right?

MR. SAFER: You have to evaluate that, yes. Whether it is quantitative or qualitative is not spelled out.

THE COURT: Just has to be reasonable.

MR. SAFER: Right.

THE COURT: You have to make a reasonable effort to make a determination.

MR. SAFER: Yes.

THE COURT: There is no -- we probably wouldn't be here if there was a magic formula somewhere because I suspect your client knows what is happening at that plant today, what was happening at that plant two years ago, four years ago, six years ago, and eight years ago. You know. They know what's going on.

MR. SAFER: Yes, Your Honor.

THE COURT: Right?

MR. SAFER: Yes. But they don't know -- this is not a "what is happening" kind of calculation.

THE COURT: Understood. It's a reasonable effort to project what's going to happen as a result of the changes being made.

MR. SAFER: And there are also -- there is a lot of dispute about what you look at as the baseline for the comparison for the future. So you use two out of five years before. And what two years did the government use? What heat rate did they use?

THE COURT: What two years did you use?

MR. SAFER: Well, we didn't do that type of calculation for this, for the three projects. It was never required by the regulations. For none of the projects was there a federally approved state implementation plan that required any calculation.

THE COURT: Why isn't this just more -- let's take it a little bit broader. The contention interrogatory issue, the issue you're talking about, why isn't this more just a subject of the expert discovery? Maybe we should accelerate the expert discovery and see where we are.

Instead of trying to pin the experts in before they give their opinion, why isn't this just part of the expert

discovery? You know, what analysis do they have? What are the experts saying? Why are they saying it? And then see where we are.

MR. SAFER: And, Your Honor, if we did that today, you know, that would be okay.

THE COURT: We're five months away from it. As hard as it is to believe, their experts are due the first week of June.

MR. SAFER: Right. But we are going to have -- that only leaves us a short period of fact discovery left when -- here is the reason why we need that in order to conduct fact discovery. There are a bunch of factual determinations, you know, as I say, what is the baseline?

THE COURT: Right. What baseline did they use and why?

MR. SAFER: What heat rate? What did they look at for outages? To what did they attribute outages? And in a more broad view, we are entitled to ask, for instance, all of the MDNR witnesses: Have you ever seen anything like this before? You know, did anybody suggest to you in the 2000s that this kind of a calculation should be done? Did you suggest this to Ameren? Fact determinations.

Because, Your Honor, they are going to say to you that this is not just a normal expert testimony where the expert says, I believe that this is "a" way to do it, and

we'll say, well, we have an expert that will do it, and let the jury decide.

They will ask you to afford deference to their calculation because it is the agency's calculation. And we -- and that entails a whole bunch of questions.

THE COURT: That begs the question, I think, about which calculation they're going to use.

MR. SAFER: Right.

THE COURT: I mean, you want to get into -- when I read the papers, okay, one of the things that struck me was, in a way they're in a tough spot. They don't know what you've done. They don't know everything about -- they may know more than I think they know, but they can't just file this lawsuit without a good-faith basis. And I don't think there's a discussion that this isn't done in good faith, but you want to know why they thought they ought to bring the lawsuit.

I mean, do you really -- if they come in with experts and say, here's what happened, here's what we know, and here's what the projections, we think the projections should have shown if they had done them -- I mean, you're telling me you didn't do any; is that right?

MR. SAFER: Yes. For three of the projects.

THE COURT: 2001, '3, and '7?

MR. SAFER: We did no quantitative analysis of this sort.

THE COURT: And they're saying you should have.

MR. SAFER: Yes, they are.

THE COURT: And you want to know why?

MR. SAFER: And we want to know why, and we want to know what it was. And, Your Honor, again --

THE COURT: My point is to get -- and I know I'm mixing and matching, and maybe you don't want me to go there, but they had -- the lawyers had to sit down and take a look at this and see if there was anything here for them really to justify filing a complaint.

MR. SAFER: Right. After three years of discovery, they sat around and they said -- so they had three years to get data, and then they said, should we file a complaint? You know, the Rule 114 was -- I believe it started in March of 2008, and so they had two years, ten months of discovery. It's not again like the normal situation. So they know all of that. It's not asking them to reveal something before it's time. They know it.

THE COURT: So if I grant your request today, I'm going to tell them to do what? In plain English.

MR. SAFER: To first just turn over the numbers, the forecasts that they made that they have identified that were -- they refer to as the screening forecasts.

Second, give us the emissions calculation that they intend to put forward in this case and the methodology.

THE COURT: That really tells me that's the expert side. You know, what the methodology is and what the emissions calculation, isn't that really what the experts are going to tell us?

MR. SAFER: It could be what the experts -- these are their EPA engineers have made this, if that's their case, Judge.

THE COURT: Right.

MR. SAFER: If that is the case. I mean, they are, they are -- I don't think they can have it both ways. So if that is the case, Your Honor, that, look, this is just litigation and their expert's going to say what their expert's going to say.

THE COURT: Here's the methodology, here's the calculation, and here's what we believe, in our opinion, this is what the forecast should have been had they made one.

MR. SAFER: As an expert in this litigation, fine. Don't then claim, EPA, that this is entitled to deference. This is a litigation position, not something that has been consistently applied as the Supreme Court requires of something that is of deference, not something that is just a litigation position, but something that has been consistently applied.

If they don't have something that has been consistently applied, then that's fine. If they want to say

that this is an expert's opinion in this litigation that is not entitled to deference, then I accept the Court's solution that we could expedite that discovery, and that would solve the problem.

If they are saying that this is entitled to deference because it is something that is consistently applied, it is not just, as the Supreme Court said, says, a, you know, that deference is unwarranted when it appears that the interpretation's no more than a litigating position.

THE COURT: Slow down so we make sure we got it right.

MR. SAFER: Oh, I'm sorry. Thank you, Your Honor. That the interpretation is nothing more than a convenient litigating position, then, you know, then we can get it in the normal course. I suspect that that's not the case, Your Honor. In other cases they have asked the court to instruct the jury that their way is the only way; that to instruct the jury that the way you calculate this emissions is our way. It's a beyond deference.

So if they're going to ask that, ask for deference, then we should be entitled to see what has been consistently applied. It has to exist. They said that we should have done it in 2001; so it has to exist. It's not something that is premature. And that, Your Honor, applies to this, to half of the projects in this case, you know. They describe the

methodology, this regained hours theory, which I think is bizarre, but that's for another day.

THE COURT: That's why we're here. If it wasn't bizarre, if it wasn't different, if it wasn't unusual, you all would have figured all this out.

MR. SAFER: I think that's probably right, Your Honor. But that applies to these maintenance types of projects where there is some, you know, replacement repair of parts. That has no application to the efficiency projects. That is, when the turbines were replaced, the turbines weren't replaced because the turbine was going to wear out. It was replaced with a more efficient turbine. And there is no reason for anyone to believe that an efficiency project would increase emissions, and the purpose of the project is so that you produce --

THE COURT: Well, that's where we get into their reclaimed hours issue, right?

MR. SAFER: No, Your Honor. The reclaimed hours is for, I've got these boiler tubes, and if I don't repair -- I have them regularly scheduled to repair them. If I don't repair them, they are going to break down eventually and the system will grind to a halt and stop, and there will be an outage. Since you repaired them, you're not going to have the outage, and so you've regained those hours. That applies to that.

It doesn't apply to the efficiency project. The efficiency project just produces for the same amount of energy is produced with less coal, or if you look at the other way, this --

THE COURT: But if you run more hours --

MR. SAFER: But it's not regained -- that's right. It's not regained from this outage theory. It's I don't know what. Yes, so if you run more hours. But where is -- that's not the regained hours. Where is that methodology? We don't know what that is. We have no idea what that methodology is.

Again, it doesn't make sense. Intuitively you would say a project of the same amount of coal produces more electricity, would not increase emissions. It would decrease emissions. And I don't think anybody, even the EPA, ever viewed those efficiency projects in the past as major modifications before this litigation campaign. So we don't have the first clue as to what the formula is for that.

With regard to the privilege issue, Your Honor, it has been waived in this case because they have put the emissions calculations at issue. So the Eighth Circuit has said that attorney-client and attorney work product privilege is waived by placing a matter at issue. And there can be no doubt that EPA has placed their emissions calculations at issue.

Again at the FOIA hearing on page 49, the government

said -- the government said -- "EPA, by filing a Clean Air Act suit, has put emissions calculations at issue, and there is a methodology in place in Judge Sippel's case for how those disclosures will be made. To the extent EPA made a mistake in Judge Sippel's case, they would have a remedy to get an appropriate amount of discovery." You know, the mistake being waiver by putting that at issue.

And there is no question that they have waived the privilege. We are entitled to those calculations that have been done. We are entitled to know what we are defending against. Otherwise, we cannot really conduct fact discovery in this case.

THE COURT: All right. Response?

MR. HANSON: Thank you, Your Honor. Andrew Hanson for the United States. I think I can clear up a few things here and respond to a few points that Mr. Safer had made. I think it's important to remember what this case is actually about. It's about what a reasonable power plant owner would have expected to result from the multimillion dollar projects.

THE COURT: You've got to admit that it's intellectually attractive that if I make my facility more efficient and I use less coal or produce the same amount of energy, that I'm not necessarily thinking I'm going to increase emissions. I'm hoping, in fact, to decrease emissions, right?

MR. HANSON: Well, that's what's called the Detroit Edison applicability determination, where EPA said, a year before this project, it was going to --

THE COURT: When you say "this project" --

MR. HANSON: I mean the 2001 project.

THE COURT: All right.

MR. HANSON: That Ameren claims produced an efficiency improvement.

THE COURT: Right.

MR. HANSON: EPA had said in guidance a year before the 2001 project that even if you make your plant more efficient, if that results in you running it more hours annually, that can still trigger new source review. Even an efficiency improvement can still trigger new source review. It's not, per se, exempt from new source review. If you end up running it more, then that's what will happen.

And we're learning in discovery from documents that Ameren is producing how much Ameren expected to run that Rush Island Unit 1 more after that efficiency improvement. So it's not as though -- it's not as though just an efficiency improvement by itself is exempt from the Clean Air Act.

A couple of points that Mr. Safer had made. The Court had pointed out that Ameren is required or a reasonable power plant owner is required to make a reasonable estimate. Now, there is a methodology. It's spelled out in the

regulation. You compare emissions before a project to emissions after a project and determine what portion of that emissions increase resulted from the project. There isn't a precise formula. There isn't a precise magic formula, as the Court had put it, but it just requires a reasonable estimate.

And in fact, EPA's regulations do require a numeric estimate, some numeric result that the power plant operator has to make before the fact, and in fact, it looks as though Ameren prepared some sort of numeric estimate for the most recent project, the 2010 project.

But getting back to the privilege issue, the privilege issue has largely been decided by Judge Fleissig in the FOIA case. And Judge Fleissig was right. The same documents that are at issue in this case were at issue in the FOIA case, and Judge Fleissig found that they were attorney-client privilege communications and that they were attorney work product. And in fact, Judge Fleissig found that they would also fall under the deliberate process privilege, a privilege that EPA didn't actually claim in the FOIA case.

And Judge Fleissig was right for a couple of reasons. The declaration of Mark Smith provides the factual basis for how these calculations were prepared. They were prepared at the request of counsel. They reflect counsel's mental impressions. It's the stuff that EPA used to determine whether or not the matter should be referred to the Department

of Justice for prosecution, and as a result, they reflect some back and forth between DOJ attorneys and technical staff between EPA attorneys and technical staff.

So there isn't much left to decide there on that particular issue. And just by way of background the way these calculations come up --

THE COURT: Obviously, all that information can easily be segregated. When I asked him what he would get if I granted his motion today, he said the forecast made for 1, 3, 7, and 10 and the screening forecasts. He wasn't talking about correspondence internally between EPA and DOJ. He just wanted to know what the basis was for the EPA to conclude that there was a problem here.

MR. HANSON: Right. And those forecasts themselves do, in fact, reflect attorney-client communications. It's the lawyers saying, well, what if you adjusted this variable, or what if you adjusted this factor in the analysis, and the technical staff going back and doing that and saying, well, that's what the result that this would yield, or the attorney saying, well, we just learned this new thing about the projects at issue. How would that affect your analysis? How does that technically play in? Those are still attorney-client communications.

THE COURT: At some point to prevail, though, here you have to establish that, in fact, a reasonable utility had

a belief that it had a problem; that there were going to be increased emissions and it should do a calculation, right?

MR. HANSON: That's correct, Your Honor. We will have to prove that. And we'll do that through expert discovery through the calculations that we'll actually rely on in the case in chief in this case.

THE COURT: You're not going to -- whatever these discussions were, they're never going to come up?

MR. HANSON: We are not going to be relying on EPA's screening analyses and calculations, the documents that Ameren basically wants. We're just not going to rely on those. They're not going to be part of the Government's case in chief, and so there isn't any particular reason why Ameren should need them even if they could make a substantial need or even if they attempted to make the substantial need argument under the attorney work product doctrine.

In fact, we've given Ameren all of the data that goes into the calculations. Ameren can prepare its own calculations, and in fact, it has prepared its own calculations, and it refuses to disclose those calculations on a basis of privilege. We've got a privilege log that's attached to our record where Ameren has identified its own calculations that it prepared after the fact.

THE COURT: I want to get you guys together. Why don't you come back up. Let's sort through this. As I read

your papers, what I was hearing was, you needed to understand what the potentialities were here; so you took a look to these forecasts to make a decision before you brought a complaint, right?

MR. HANSON: That's right.

THE COURT: But these forecasts that you relied on in making a determination to proceed are no way going to be used by you in prosecuting the case.

MR. HANSON: That's right, because they predate the discovery in this case. They predate our ability to get civil discovery in the enforcement action from Ameren where we get to gather additional information, take depositions, pose interrogatories, and then let our experts take that information along with the Clean Air Act.

THE COURT: The more certain. I mean, I gathered that you didn't know all the possible things that had happened or had gone on, right?

MR. HANSON: That's right, because Ameren didn't tell us when they performed the projects. Ameren didn't tell EPA, hey, we're going to be doing this project and we project no emissions increase. They didn't tell EPA ahead of the fact. We had to find out after the fact through EPA's investigation.

THE COURT: Is he right that they have given you all the raw data they looked at in making this decision?

MR. SAFER: The raw data is supplied by Ameren.

THE COURT: Right.

MR. SAFER: So there's a -- that's like saying that we know all of the numbers in the world. How come you can't --

THE COURT: Well, it's not an infinite universe.

MR. SAFER: But it's pretty close. It's an enormous amount of data. What did you use? You know, again, what baseline period did you use? What heat rate did you use? What emission rate did you use? To what did you attribute certain outages? That is the heart of this, and it is revealed by these calculations.

They might not use these calculations. We would like to use these calculations. They are not attorney-client communications. They're numbers. There are calculations.

THE COURT: Well, there's a difference between numbers and then what the attorney does when he looks at the numbers to determine how to proceed.

MR. SAFER: And that's fine.

THE COURT: What he's suggesting to me is, he's given you all the numbers they looked at. He just hasn't given you their internal analysis and thought process of making a decision about what the numbers tell them.

MR. SAFER: Well, again, they haven't said which numbers they used for those calculations.

THE COURT: I'm left with -- help me out with this

deference issue because I really am left with, I mean -- look, at the end of the day, the last thing I want to do is put my hand on the scale. We just come in. And it seems to me the sooner we get to these experts reports and you take these depositions, the sooner this case comes into focus.

And then if we need to back up, much to my horror because it's the last thing I want to do, and go, wait a minute, I didn't know you looked at that, or this wasn't a factor I ever thought you would have considered, I need more information about that data now, we can fix that. I mean, I understand you've kind of got your back to the wall. The judge said, here's the expert schedule, and then I'm kind of stuck with it, but it seems to me when you think about the order of discovery, this is a case that cries out for you getting a look at their expert. And then if there's some fact that they're relying on or some series of data points that they're relying upon and you had no idea that's where they were coming from, we can back up and open up fact discovery for three months on those issues for you to respond to it so that you don't have one hand tied behind your back when you're trying to figure out what the theory of the case is.

MR. SAFER: And I think, Your Honor --

THE COURT: Does that make sense?

MR. SAFER: It makes perfect sense.

THE COURT: But I know the schedule now doesn't

contemplate that, so that's probably partly why we're here.

MR. SAFER: If as long as they don't claim that this is something entitled to deference, I think that makes perfect sense.

MR. HANSON: To be clear, Your Honor, we are not claiming --

THE COURT: Are we talking Greek, or are we talking the same thing? Because if we're talking Greek, I'm the one talking Greek. You're talking whatever you guys talk and I'm talking normal everyday stuff, okay?

MR. HANSON: What we would propose, Your Honor, is to actually accelerate the case management schedule. If they want expert discovery to happen sooner and move up the trial date in this case, we would be perfectly fine with that.

THE COURT: Let's do one thing at a time. Let's get our arms around the expert, because this is a case about experts at this point in some ways, what a reasonable utility should have known about what it was doing and whether it reasonably should have made a calculation about increased emissions or not, right? And that's not a layman's determination.

MR. SAFER: That's part of what the case is about. I mean, part of it is going and asking the real people who were responsible for enforcing this, for instance, did you ever think about this? Is this --

THE COURT: Your people or their people?

MR. HANSON: Both, Your Honor.

MR. SAFER: Missouri. Yeah, both of them.

THE COURT: On both sides. Your folks, why didn't you do it?

MR. SAFER: And the Missouri people, you know, the Missouri Department of Natural Resources. Did you ever hear about this? Did you ever think about this? Did you ever talk to anybody about this? And we need to know what this is.

THE COURT: The deference issue causes him heartache. What do you think about that?

MR. HANSON: Yeah. To be clear, Your Honor, we're not seeking deference on emissions calculations.

THE COURT: That's the way he wanted to hear you say out loud, you know that.

MR. HANSON: Yeah. We're not seeking deference on the emissions calculations. Rule 702 will govern the admissibility of expert testimony in this case.

THE COURT: So a traditional litigation analysis.

MR. HANSON: It's not a matter of deference. The method is spelled out in the regulations in case law on how to conduct a reasonable estimate of the emissions impact on a multimillion dollar project like this one.

What we're concerned about, Your Honor, is moving up the deadline for expert discovery but then not having an

opportunity to also move up the rest of the case because, frankly, this is not complicated.

MR. SAFER: Well, then give it to us. Give it to us and we'll do it.

THE COURT: Well, let's move up the expert schedule so you can get the information you're looking for. But if you're ready -- I mean, do you have the facts you need? The last thing we want to do is you get -- you let me know in March, well, we really should have talked to so-and-so and so-and-so because here's some pieces of the puzzle we're not clear about, and before I want my guy to testify, he needs to know the answers to these questions.

MR. HANSON: Right, Your Honor. We can be ready after we take depositions and if we have a reasonable amount of time to take the depositions that we need to confirm and learn more information about these projects because we'd like to know how Ameren couldn't have concluded that these projects would result in emissions increases. Ameren has prepared its own emissions calculations here to determine whether or not these projects should have been expected to result in increases. We're entitled to know how they concluded that. We're entitled to ask other fact witnesses who were responsible for that, for that job at Ameren, how they couldn't have concluded otherwise.

THE COURT: So are we talking about 90, 120 days to

do that? Otherwise, we're on the schedule we're on now, which is June 3 or whatever.

MR. HANSON: Right. We can move it up to April. Again, what I'm concerned about --

THE COURT: That's going to give you 90 days to do this discovery because January, February, March and your expert's report is due in April, but the expert isn't going to conjure this thing up the last week of March. I'm just trying to be reasonable. June may not be as crazy as it sounds.

MR. HANSON: June is actually reasonable.

MR. SAFER: Maybe the solution is extending fact discovery into that same period of time. Could I --

THE COURT: I never -- look, who knows what I wrote, because this is an unusual case, we don't do this all the time, but I never bifurcate discovery in the sense that you can't continue to do fact discovery. Most cases I would always grant 30 or 60 days after the close of experts because there may be some fact issues you need to clean up because of a point of view that you hadn't or your expert hadn't considered. You need to go ask some more questions just to close the loop. So I mean, that to me is the way to manage this.

MR. SAFER: Your Honor, could I have just one moment?

THE COURT: Sure. There's great thinkers on your side of the room that want to share.

MR. SAFER: Right. Thank you.

(OFF THE RECORD.)

THE COURT: All right.

MR. SAFER: Your Honor, I think there are just a couple of issues to share with you in the interest of --

THE COURT: Now is the time. You know, you don't want to come back next week.

MR. SAFER: Right, right. Hopefully, we'd find an empty courtroom next week.

THE COURT: Maybe. The courthouse is always open by statute.

MR. SAFER: First of all, I think that there -- unless we accelerate some, the expert disclosure at least on this issue of what is --

THE COURT: Their emissions calculations.

MR. SAFER: Yes, yes. That then we're going to have -- unless we do that, we'll have really inefficient fact discovery.

THE COURT: Okay. You pretty much know what your emission calculations are now, right?

MR. HANSON: I wouldn't say that, Your Honor. There is discovery that we still need to take.

THE COURT: Okay. What do you need?

MR. HANSON: We need to take depositions, and we're still waiting for, I think, a large number of electronic

documents from Ameren in response to our discovery request.

THE COURT: Well, I hate that, because that will take -- just getting it and going through it and --

MR. HANSON: Yeah. I mean, in one sense the June deadline is perfectly fine. Their expert disclosures are due in August. They get two months to look at what our experts have done. It's only six months away. There isn't really a reason to accelerate this.

And I don't think expert discovery is going to be inefficient given that we've given them all the data. We've explained how EPA performed its initial emissions calculations. The parties have multiple depositions that they want to take. And Ameren has performed its own calculations. In fact, Ameren boasts at how well it projects generation from its units. It uses a special model.

MR. SAFER: Apples and oranges.

THE COURT: I'm sure they're good at it. Yeah, I'm not --

MR. HANSON: My point is, Your Honor, I think June is probably fine, but if we did move it up, we'd want to have a mutual exchange of expert reports where we find out how Ameren concluded that their projects wouldn't trigger and we explain why we think the projects would have triggered. I mean, that is fair. That provides an opportunity for some mutual fact discovery after the fact so -- you know, that cures the

inefficiency problem that I think Mr. Safer has mentioned.

THE COURT: In your perfect world, what do we do?

MR. SAFER: I think we move up -- they give us their methodology.

THE COURT: Remember the one thing we don't want to do is do experts twice.

MR. SAFER: Exactly. We don't want to do that, and I understand that. I'm trying to wrap my head around the "this should have been done in 2001, but we can't tell you what it was."

THE COURT: That's an interesting argument, but we're not going to spend our time on that today.

MR. SAFER: Okay. But that's preventing me from figuring out what they need before --

THE COURT: Well, what they don't know is perhaps all the things that Ameren did or didn't do or what it knew. You know, they can guess.

MR. HANSON: Ameren won't even explain to us how they calculated the projects.

THE COURT: I understand. They want to get their arms fully around what was known at Ameren before they go further, because they don't know that.

MR. SAFER: So I'm not sure what we do in a perfect world because what we wouldn't want to do, because it'd just be horribly inefficient, is take a lot of fact discovery

without knowing what the central theory of the case is and then -- because it really isn't just all about experts, Your Honor. These were real people --

THE COURT: Oh, I understand.

MR. SAFER: -- that had to make the determinations, so we'll ask the real regulators and the real engineers that had to do this. And so to ask them once, take discovery --

THE COURT: See, that's what they want, because when should it have been obvious to Ameren that it needed to make a estimate of emission increases?

MR. SAFER: As soon as the rules and regulations required it, which was never.

THE COURT: That's your argument.

MR. HANSON: And of course we --

THE COURT: Their argument is, there's a point in this process at which it should have become clear to the decision makers that what they were doing was going to increase emissions and they then had a duty to make a calculation and perhaps go to the EPA and seek a permit. That's where the fact question hits the road here.

MR. SAFER: Right.

THE COURT: Whether that's justified or not will depend somewhat on the expert's analysis.

MR. SAFER: Right. So how they calculate their emissions really, how they do it, what's the formula, that

really is nothing to do with any of that, any of what Ameren actually did or didn't do. Or at least I don't see it. So I'm missing that part.

MR. HANSON: I think the issue in the case is what Ameren expected. We need to take depositions. We need to learn Ameren's documents. There may be documents out there whether from third parties or from Ameren where somebody said maybe we should have gotten an NSR permit for this project or maybe we should get NSR, an NSR permit for the project, or there may be a deposition witness who says, yeah, we thought about it, and here's what we considered and thought, and we thought that maybe we should have but decided that we wouldn't.

MR. SAFER: And that has nothing to do --

MR. HANSON: That has everything to do with the central issue in this case.

MR. SAFER: Has nothing to do with what their expert is going to say Ameren should have done in 2001. They say Ameren should have done a calculation in 2001 that would have told it that emissions would increase. What is that formula? That's the central issue in the case. How did they reach that conclusion, that has nothing to do with whether an Ameren person said, gee, maybe we should get a permit or not.

MR. HANSON: And, Your Honor, I submit that it has everything to do with what the experts conclude in this case,

because if a reasonable power plant owner or operator --

THE COURT: It might be indicia of it. It's a tough one, because the word "reasonable" means different things to different people, and it depends a lot on what your people knew and when they knew it, what they understood, you know, was going to be the effect of what they were doing. I mean, you can get into a repair, I suspect, or replacement project and then realize some benefits maybe you fully hadn't anticipated. Or they might have seen them coming three months earlier or six months earlier. You know, I'm sure they didn't just flip a switch one day.

MR. HANSON: That's absolutely right. Ameren could have concluded after the project that the project triggered.

THE COURT: And there would be no harm in that, if they only found out after they did the project, right?

MR. HANSON: They would have been required to go get a permit from the permitting authority, and if they failed to go get a permit from the permitting authority if they concluded after the fact, they can be held liable on that basis too.

MR. SAFER: That isn't what they've alleged.

THE COURT: I know. That's not this case.

MR. SAFER: Right. It's not this case. They've alleged that we should have performed calculations before the project. They have done these calculations. They are not --

they are concealing them, having put them at issue, and they won't give them to us. They could hand those over right now. Those are easy. Those have been put at issue.

THE COURT: But they're saying that these calculations were done with counsel to make a determination about whether or not to pursue the litigation.

MR. SAFER: We need that, Your Honor. They've put emissions calculations at issue. They have said they put emissions calculations at issue. We are entitled to those emissions calculations. If they want to explain them away for any host of reasons, they are free to do that.

EPA's emissions calculations that form the basis of their allegations in this complaint, not a theoretical calculation, that formed the basis of their allegation in this complaint that we should have known that this was going to cause increased emissions have been put at issue. They've waived any privilege with regard to those. Those are easy.

MR. HANSON: Two responses to that, Your Honor. Emissions calculations are at issue in this case but not these emissions calculations. The other point is that Ameren performed emissions calculations that it is refusing to produce.

MR. SAFER: That's totally different. They are the regulator, Your Honor. They are the regulator in the case. They did these, they said, for the purpose of determining and

to their regulations whether this violated the regulations. We can do them for a million different reasons. To exposure, what is the company's exposure? What is our securities disclosure going to have to be? Those are real privilege issues. These are done by a regulator for the purpose of seeing whether or not the regulations according to them were violated. Those are as far apart as you can possibly get.

MR. HANSON: Now it's the concern that we have here is that Ameren wants to play by its own set of rules where our emissions calculations are not privileged but theirs are. They've pled affirmative defenses in this case where they allege that their project should not have been expected to result in emissions increases or all of the emissions increases that actually occurred are due to demand. If we've waived the privilege, so have they by pleading affirmative defenses, but I don't think that's Ameren's position. It doesn't make any sense. That can't be the law that by bringing an enforcement action EPA waives the attorney-client privilege and attorney work product over its emissions analyses when expert discovery will provide the date by which those are actually produced in the case.

And I'm sure Ameren will have experts where they will produce their final expert testimony that support the basis of their affirmative defenses. That date is June for the United States, and it's August for Ameren. That's only six months

away.

MR. SAFER: The difference is, they have provided affidavits which say that the basis for this lawsuit, the basis for these allegations, were these tests. And you know, we are not playing by our own rules. We are just trying to find out what the rules are. And they said you'll find out what the rules are during litigation. Okay. Well, here we are.

MR. HANSON: We have produced dozens of pages of interrogatory responses that explain what the regulations are. The regulations themselves represent hundreds of pages of documents that explain themselves in terms of federal register notices and guidance.

Expert discovery is coming in June. That's when Ameren will find out the basis for the government or the emissions calculations that the government will use for its case in chief. The government shouldn't have to turn over its attorney work product or attorney-client communications, nor should necessarily Ameren, unless it's willing to make a waiver.

THE COURT: How many pages of documents are we talking about?

MR. HANSON: That Ameren seeks in this particular motion?

THE COURT: Right. If I were to grant their motion,

what are we talking about?

MR. HANSON: I believe Ameren seeks 31 documents, 31 emissions analyses off of the government's privilege log. And Ameren's spreadsheets will comprise -- I think there are three separate spreadsheets that comprise their emissions calculations on their privilege log.

THE COURT: I mean, I'm inclined to deny the motion to compel because counsel is entitled to make an evaluation of the case and how to pursue the case and to look at, as he described, well, what if this, what if that, and they haven't waived the privileges as to that.

But I think out of an abundance of caution I need to look at them in camera to make sure that that's what they are.

MR. SAFER: Thank you, Your Honor. That's fine, Your Honor.

THE COURT: I may be borrowing trouble.

MR. SAFER: That's fine, Your Honor. And if anything in there says, you know, please look at this for purposes of --

THE COURT: Right. I need to just satisfy myself that it stays within the -- I'm not doubting counsel, don't get me wrong. I just want to have the assurance that that's what we're talking about.

MR. HANSON: Understood, Your Honor.

THE COURT: And it isn't inadvertently broader than

that.

MR. SAFER: And if they're just numbers --

THE COURT: That goes to you too.

MR. SAFER: That's fine.

MR. HANSON: So Your Honor is seeking Ameren's emissions analyses as well as the government's to review in camera?

THE COURT: Right. Well, you don't have a motion to compel, so I really, really, really don't borrow trouble, you know. I'm not going to pick a fight that hasn't been picked for me, if you understand.

MR. HANSON: I do understand.

THE COURT: So I wouldn't go there probably if I were you because that just -- but you'll know what happens if I ultimately rule against you. I'm sure the next day I will see a motion, right? You'll probably work that out.

MR. SAFER: I would assume, Your Honor.

THE COURT: You'll work that out.

MR. SAFER: We've worked out -- we've tried to work out lots of stuff.

THE COURT: But I do think that you're going to have what you want by the time the experts are done. I'm thinking August may be too soon for your response is what I'm thinking.

MR. SAFER: I think that's right, Your Honor.

THE COURT: Given the scope of what you're going to

depose the experts about, that the next thing we're going to do is push your expert deadline a month or two to allow you to do some follow-up to be ready, to have your expert report ready. I know we haven't written that down and you count on it, but I won't be surprised if that's the next motion I get for this to go without duplicating effort unnecessarily.

All right. What else do we need to talk about today?

MR. HANSON: Nothing with respect to those motions, Your Honor. There is a second motion, I believe.

THE COURT: All right.

MR. HANSON: Thank you.

THE COURT: You're the contention interrogatories man.

MR. MOCK: Well, no, Your Honor. That was Mr. Safer.

THE COURT: Because the contention interrogatories aren't going to be answered until the expert reports are due.

MR. HANSON: That's correct, Your Honor.

THE COURT: They come together.

MR. MOCK: Understood.

THE COURT: All right.

MR. MOCK: Your Honor, I am the discovery of the EPA regional documents guy.

THE COURT: Oh.

MR. MOCK: Yes. So, Your Honor, through our motion to compel we seek two categories of documents. The first are

these regional documents, all paper that are at issue in this motion from the regions other than Region 7 and headquarters.

THE COURT: Region 7 and main EPA. If they're right, they have produced materials from, we would call it, main justice but from headquarters and Region 7.

MR. MOCK: That's right, Your Honor. The reason we seek these is -- well, there are a number, and I will give you three, and I can talk about them in more detail. First of all, it again goes to this deference issue, Your Honor. We need to be --

THE COURT: He says he's not asking for deference.

MR. MOCK: Well, I think maybe perhaps --

THE COURT: Are you using the word in a different way?

MR. MOCK: On a different issue, Judge.

THE COURT: All right.

MR. MOCK: So they may not be seeking deference on emissions, but as we understand it, they will be seeking deference on a whole host of other interpretation of these NSR regulations. And that's on issues like routine, what is routine in the industry, whether certain projects should be considered together. That's something called aggregation. How the rules discuss whether a plant or unit can accommodate a certain level of emissions, and that's a provision that goes to causation, in other words whether the project caused any

actual increase or whether it could have been accommodated beforehand. And the demand growth provision.

There are a number of these different issues. The reason why this is such a focus of our discovery efforts, Your Honor, is that EPA over the years has been extremely vague in its regulations. They either have not promulgated any rules at all or they have promulgated rules that are very vague and unspecific. You know, the emissions is a good example of that. They don't say how to calculate it. And as Your Honor said, if they had, we probably wouldn't be here fighting over it.

So we want to take discovery on EPA's interpretations and how they've changed over time and how they have been interpreted differently by different EPA regions or different EPA personnel.

THE COURT: Is there any evidence that Region 7 is treated any differently and their interpretations changed over time?

MR. MOCK: So, for example, we have Jon Knodel, an email from Jon Knodel, who is, as I understand it, the head of EPA's -- he's the PSD coordinator in Region 7, and we have a 1998 or 1999 email from him saying: Boiler tubes or replacement of boiler tubes are routine. The agency considered them to be routine.

Turbines. In the same email he says no problem with

turbine projects. That, of course, is 180 degrees different from the litigation position that EPA is taking in this case and is consistent, by the way, Your Honor, with how MDNR interpreted these regulations. MDNR has seen these boiler tube projects, which is the bulk of what we're dealing with here, as being routine. Routine parts replacement. So that's a very key issue in this case.

But separate and apart from that, why we are seeking the discovery from the other regions is that these different regions may -- and that's why we need discovery, may be viewing these rules and applying them and interpreting them differently. One of the themes that the jury will hear at trial, Judge, is that how EPA went at these rules changed markedly when it began this litigation campaign in the late 1990s.

And we cited and quoted a letter from a Virginia head of DNR, head of the air program, who said: This is a seismic shift from the 25 years of how this has been interpreted prior to this litigation campaign. So that's the first and foremost reason why we need this discovery from the other regions.

Now, to highlight that, EPA is itself offering interpretations from those other regions. So EPA, even though it says in its papers this is a case about a Missouri plant, this is a case about Rush Island and about MDNR's interpretation of these regs, EPA is itself offering

interpretations from Region 5, 1, 3, 9. Mr. Hanson himself referred to the Detroit Edison interpretation about turbines. That's from Region 5. That's not from Region 7. And that is the only basis for their take on this turbine emissions projection argument.

So we want to see did other regions view that differently? Because it is a very intuitive proposition that if you have an energy efficiency project, you're not going to see an emissions increase from that. So that's why we want to take discovery on that.

The other issue, Judge, is fair notice. So we want to be able to demonstrate through discovery of these documents that Ameren did not have fair notice of EPA's new interpretations of these rules after it started this litigation campaign.

And again, that Virginia document that I referenced a moment ago is a way of showing that, and we expect to find more like that one. In other words, EPA is changing the way it has viewed these for the last several decades.

And then, finally, we need these documents to prepare for deposition discovery. We asked EPA: Identify the people, the current EPA employees, who have responsibility for interpreting and applying and enforcing these regulations. They gave us a list of 600 people.

We asked them for work groups that are used at EPA to

handle all these various issues, NSR issues, power plant issues, and they gave us several other pages of -- you know, I believe the NSR work group was four single-spaced pages. And these people are from every region across the country.

And so we need to figure out who we want to take the deposition of, and the way we can do that is, of course, to see who's really dealing with these issues and what they're saying about them.

THE COURT: The way to do that is through a 30(b)(6) deposition. Tell them what you want to know and they bring the person who has the most knowledge.

MR. MOCK: Certainly that's one way to do it, but we might not always want the person with the most knowledge or the person who's going to espouse EPA's, you know, their current litigation policy. We want the guy who, eight years ago, told a coal-fired power plant in New Jersey that, you know, when you do these boiler tube projects, that's okay, that's routine, you don't need a permit for that.

We want a situation where in Alabama or in North Carolina the state writes the EPA and says: One of our sources is going to do a turbine project. Does that pose any NSR problems, any PSD problems? And EPA either doesn't say anything or says, yeah, as Knodel did in 1997, that's not an issue.

Those are the sorts of documents that we want to get,

and so we want to go and talk to those people, those witnesses, and not a 30(b)(6) witness.

THE COURT: I'm kind of hard put to conjure up a world in which your client doesn't talk to other utilities around the United States to find out who got a pass and who didn't.

MR. MOCK: Well, I don't think that that's how it works, Judge. There are a lot of -- first of all, there are a lot of --

THE COURT: Ameren doesn't talk to anybody else. You just got sued because we didn't get a permit. What happened to you when you did that plant?

MR. MOCK: Well, these are competitors, so these are competitors who are selling into the same markets, and I don't think it is commonplace for power plants around the country to coordinate on, you know, what have you done on this and what have you done on that. I don't think that's the case. And there's certainly no indication of that.

THE COURT: All right.

MR. MOCK: All right. And so, Judge, just as a matter of fundamental fairness, if they are going to offer these interpretations from other regions, as they have told us that they will and as they have in other cases, then we should be entitled to take discovery from those other regions to see what is out there to what undermines or refutes what they're

offering.

THE COURT: Okay.

MR. MOCK: A lot of time has been spent in the briefs, Judge, on the burden at issue here. And I think that is something -- we filed -- the United States filed a sur reply. We filed a response. We've got a little bit more intelligence in terms of the real burden at issue here, and it is not a burdensome process.

We recently completed the Region 7 review in place. The result of that is that 2,200 documents were produced that Ameren selected. It's not a big number, especially in the scheme of this case.

THE COURT: How many pages was that?

MR. MOCK: I believe it's somewhere just south of 50,000 pages. Now, Ameren for its part right now, we've already produced half a million pages and we are in the process of gathering tens of gigabytes of electronic information, and I think a gigabyte is about a hundred thousand pages. So don't know exactly what we'll produce, but it's going to be far, far, far in excess of 2,200 documents.

I don't know how much time Your Honor wants me to spend on what EPA said about its burden, but they have thrown out a number of estimates: Seven to nine months, 12,000 hours, and miles of paper. And I think the EPA Region 7 review puts those estimates to rest. It's just not going to

take that long. In fact, these other regions will have fewer sources than Region 7 does, and so we think that it will take even less time per region.

Now, I should say, too, just to clear up something in the papers, we are willing to ease their burden by doing this in-place review, but we are certainly not seeking to compel that. One of the other things that we learned from the Region 7 review is that we think with some cooperation with EPA, just sitting down and talking, and not for much time, and reviewing some document indices, that they've given us some and we think they can generate others that are more -- sorted a different way or give us a little more information.

And talking with the people on the ground in these regions we can really cut down the time, which is not great to begin with, but we can really cut it down and get right to what we want, perhaps even just selecting from a document index the specific files or folders that we're looking for. So we think that that can be greatly streamlined.

We've been talking about this all summer, Judge, and we had almost arrived at an agreement on this. And back when we were talking about it, EPA estimated that we can do this whole thing in about two and a half months, and so it's not terribly burdensome.

THE COURT: All right. Where do we end up?

MR. MOCK: Your Honor, there is the -- there is one

of the part of this motion is the documents from the Department of Energy and FERC. I don't know if you would like me to address that now.

THE COURT: You can throw it in there.

MR. MOCK: All right. So this is a very targeted request, Judge. Six categories of documents. Three of those categories are with respect to specific reports that were generated by EPA. So very narrow, you know, we identified the report and said, please give us the documents that go along with or were used to generate this specific report.

So the six categories of documents we're seeking from the Department of Energy and FERC fall into basically two categories. One are these energy efficiency projects, again this turbine project. It's raising a lot of issues as to what -- and this again goes to Ameren's expectations. If the Department of Energy or FERC or other players were saying this is a good thing, you know, energy efficiency projects are something that we should encourage as a matter of policy, or we're anticipating that they would not increase emissions, well, that is all evidence that of course supports the reasonableness of Ameren's view that these would not affect emissions in a negative way at all.

The other category is the changing nature of the energy markets since deregulation. So deregulation happened in the late '90s, and that fundamentally changed how

electricity is bought and sold.

And as we've talked about a little bit earlier today, there is the demand growth provision in the NSR rules, and again that says if the increase in emissions is attributable to a change in demand growth and electricity demand, then that is not -- that does not give rise to the need for a permit.

So that's a big part of our defense. And one issue that we have to develop around that defense is how these markets have changed, and they have changed fundamentally since the '90s.

And I will stop there, Judge.

THE COURT: All right.

MR. MOCK: Thank you.

THE COURT: So how about it? You're prepared to give them documents from Regions 5, 1, 3, and 9, but at the end of the day you just couldn't do it. So what happened?

MR. COONEY: I'll get to that, Your Honor. I want to start, I think, with the document requests themselves, and I have those here in case Your Honor doesn't have them handy. This was Exhibit E that Ameren attached to their motion.

And these are the first three sets of documents requests that Ameren served, Document Requests 1 through 72. They're up to 80 RFPs currently. But I think it's helpful to just start by looking at what these requests are, and I will point out a few of them. Something like Document Request 14

on page 9: All documents, including plant inspections, permit applications of any kind, investigations, communications of any kind from state or federal agencies, or studies or consultations concerning industry practices for the periods since the enactment of the Clean Air Act to the present that identify any and all activity -- you know, from there relating to coal-fired EGUs.

Request 17 is similar. All public statements, guidance documents, and other publicly available information. If it's publicly available, we're not sure why we -- Ameren needs it from us and the idea that we have to go region to region and gather anything that's ever been said publicly about cost effectiveness or efficiency at EGUs.

Some of the other, I'll also point to 31 and 32 on page 12. Thirty-one is all documents referring or related to any speeches or public pronouncements. The scope of this isn't something that we can -- that isn't manageable. When Ameren's talking about every region, a speech is anything given, you know, to an elementary school about clean air by an engineer at EPA.

Document Request 32 is all documents -- well, yes. You see my point here. We think the motion as it stands is unripe, it's unclear, and it's unnecessary.

THE COURT: Why is it unripe? That means we're not there yet.

MR. COONEY: It's unripe because the United States has already produced in this action about 900,000 documents that total 5.8 million pages. These documents came from Region 7, yes, and headquarters. Many of them, though, the documents off the Legacy hard drive that we refer to in our motion, that's a nationwide production. Those come from every region. Documents from headquarters reflect activity at every region.

So Ameren already has a nationwide sense of how EPA has implemented NSR, but then when you take those documents together with the electronic documents that we're producing, thus far we've gathered about 1.1 million electronic documents and emails. We gathered those from 85 individual EPA employees across headquarters and seven separate regions. Those 85 people were people Ameren picked from a list. We worked together and Ameren got to say who they wanted documents from, and they got to choose the search terms that would be used to search those.

Those documents are still being collected, there's well over a million of them, and we think at a minimum Ameren needs to take what's on its plate first and see -- look at the 5.8 million documents we've produced and then narrow this request in some way that's manageable.

THE COURT: Well, actually, why don't you come up. Federal Rule of Civil Procedure No. 1, did you read it lately?

MR. MOCK: Probably not.

THE COURT: Probably not. It's one of those that gets by all of us. And it goes then with inherent power the court has that doesn't necessarily vest in lawyers to kind of manage discovery so that we kind of stay inside Rule No. 1.

These rules govern the procedure in all civil actions and proceedings in the United States District Courts. They should be construed and administered to secure the just, speedy -- and here's the tricky word -- and "inexpensive" determination of every action.

So I doubt -- I think we're already past inexpensive if we're dealing with millions of documents. But you're entitled to get the documents about whether boiler projects are routine or not from the headquarters of the EPA that they have and in Region 7.

Now, after you look at all of them and you've got documentation produced from the headquarters that suggests there's been a discussion in Region 1 or Region 9 or Region 3 about whether boilers or other tubes are routine, then come back with a narrowly tailored request, because you now have some suggestion in another region that there's been a discussion about it, but we're going to look at headquarters or we're going to look at Region 7.

Once you get done looking at that, you've got some suggestion that these discussions have taken place in other

regions, then we'll open the door to go there, but we're not going to start there. Do you follow me?

MR. MOCK: If I can respond briefly --

THE COURT: Yeah.

MR. MOCK: -- with an issue that I see with that. Each of these regions has the ability to day in, day out, operate independently. They couldn't possibly run everything by HQ, and so they are working day in, day out and dealing with issues and never contact HQ.

THE COURT: Yeah, but we can ask for every document ever generated by any region of the EPA on any topic that has to do with the Clean Air Act, sure, we can do that, but that's not what's going on here. And you already told me that Ameren's not talking to anybody else. They don't have any suggestion that any other utility in any other region is being treated differently, because they don't share information. I find it hard to believe, but it's possible. And so you're dealing with the administrator in Region 7 and how the regulations are applied to you.

And you're right. I mean, if there's been an experience your client has had that this turbine project has always been treated as routine, that's pretty important, or that boiler project's always been treated as routine and now all of a sudden they're changing the rules on you and you didn't have fair notice that you had a problem, hey, we got a

problem.

But if you didn't know that in Region 3 Timbuktu company was being treated differently, I mean --

MR. MOCK: That certainly is true, Judge, as to the fair notice issue.

THE COURT: Right.

MR. MOCK: The deference issue, however, is different, and I don't think it turns in any way on what Ameren actually knew or didn't know. It turns on how EPA interpreted.

THE COURT: So if you find anything at the headquarters of the EPA in discussions about these topics and all these documents you either have gotten or are about to get, you come back and show it to me and we will open the door in those regions to pursue it, but we are not going to start there. It's the only way I can manage this before this becomes just a mountain.

MR. MOCK: Your Honor, how are we then able to attack the interpretations from the other regions that EPA is offering?

THE COURT: Well, if they -- then you're going to come back with and you're going to give me a specific document request. You're going to cite that, cite the statement, cite the employee, or cite the document that they are relying on, and then ask for all the documents from that region about that

project or that event, and I will grant that.

MR. MOCK: Understood, Your Honor.

THE COURT: We're not going to burn our way to Atlanta to see what's in Atlanta. You're going to get to go to Atlanta. If you find there's a path out of there, I'll let you explore it.

MR. MOCK: Very good.

THE COURT: That's the only way to manage this so you don't spend the rest of your life reading documents or some associate that you may not have even met yet will spend the next year of their life reading in a room somewhere that has no light in it.

MR. MOCK: May I raise one other issue, Your Honor.

THE COURT: Sure. I can manage this for you, okay? Without getting everything, let's get what we need. That's my point.

MR. MOCK: And I hear what you're saying, Judge, absolutely. We have an agreement on the ESI, so what we've been talking about is the paper of the other regions. We have an agreement on the electronic discovery. We reached that agreement a couple months ago with EPA that they're going to use those search terms that --

THE COURT: You have agreed on the search terms. You've agreed on whose records should be searched.

MR. MOCK: And they would search the electronic files

of the regions and then produce that to us pursuant to what we agreed on.

Yesterday I received an email from Mr. Hanson saying they were essentially reneging on that deal and that they are now not going to produce the files that hit those search terms and that they -- because they're claiming it is too burdensome.

THE COURT: Well, you're going to have to tee that up for me.

MR. MOCK: Okay.

THE COURT: I can't do it on the fly. And I don't mean to make it hard, but document for me what you agreed on and then what happened and --

MR. MOCK: We will do that, Your Honor.

THE COURT: You follow me.

MR. MOCK: I do.

MR. COONEY: Your Honor, can I speak to the deal we -- in FERC documents?

THE COURT: Yeah. We haven't gotten there yet.

MR. COONEY: I'm sorry if you're weren't --

THE COURT: No, no, no. We need to close the loop on that.

MR. COONEY: Okay.

THE COURT: I hadn't ruled on it.

MR. COONEY: Just a few words about DOE and FERC.

These are agencies within the executive branch of the government, but they are not agencies that brought this lawsuit or that have any connection to it.

Ameren has spoken about two discrete issues, one relating to efficiency and one relating to demand. We would argue that those issues aren't meaningfully in dispute in a way that justifies discovery from these separate government agencies. This is why every court that has addressed this issue in every NSR enforcement case the United States has brought has said that discovery outside of EPA is inappropriate.

THE COURT: Was there any interaction with the Department of Energy and FERC on this project about these alterations?

MR. MOCK: On the Ameren projects at issue in the case, Your Honor?

THE COURT: Right.

MR. MOCK: Not that we're aware of.

THE COURT: Nothing that you'd be allowed to pursue that. If you were interacting with them and they were making suggestions to you or you were --

MR. MOCK: And that is not the basis for --

THE COURT: -- you all sang "Kumbaya" together and the EPA showed up and said "not so fast," I mean, I would let you pursue that.

MR. COONEY: But if in the broader sense what Ameren is seeking here is documents that suggest that the United States government promotes efficiency or that efficiency is good, you know, we don't -- first of all, that's what FERC does. They regulate utilities and they -- with an eye toward efficient power generation.

But secondly, that's not an issue that we need to dispute or we should be spending our time producing scads and scads of documents over. The types of things that they cite in their motion --

THE COURT: Is "scad" a legal term?

MR. COONEY: I doubt it, Your Honor.

THE COURT: Just checking. It was a number that I didn't know.

MR. COONEY: And it's large from what I can tell.

THE COURT: Okay.

MR. COONEY: But some of the requests, the six broken-out requests in their motion, two of them relate to EPA reports. Ameren wants to know, well, what did FERC say, or what did DOE say about a report that EPA generated?

Well, if it's relevant at all, EPA has it. If EPA consulted those agencies, if EPA interacted with them --

THE COURT: Did they ask you for any materials you have from FERC or the Department of Energy in response to those studies?

MR. COONEY: Yes. That is items --

THE COURT: Did you produce it?

MR. COONEY: We have not produced anything --

THE COURT: But you're going to.

MR. COONEY: I'm sorry. We need to back up. Have we produced from EPA? Is that --

THE COURT: Right, from EPA.

MR. COONEY: Yes. We will, or we have done or will.

THE COURT: From EPA documents they may have from FERC or the Department of Energy as on those topics.

MR. COONEY: Yes, Your Honor.

THE COURT: And you're not going to claim -- you're going to produce that.

MR. COONEY: If EPA has and if it's relative or responsive, we will produce it regardless of whether it came from FERC or DOE.

THE COURT: All right.

MR. COONEY: But, right, that's two of the requests. A couple of the other requests, as I said, go purely to whether efficiency is good and whether DOE promotes cost effectiveness with utilities.

The other two relate to -- one is a withdrawn defense over greenhouse gases; that Ameren withdrew its defense relating to the projects we're complying with the greenhouse gas rules.

And then the FERC Order 888, that's Item A, we have made available to Ameren the rule making docket for FERC Order 888, EPA participated in that rule making, EPA submitted documents onto that docket, and we have provided that to Ameren. It's publicly available.

To the extent that Ameren thinks that those publicly available documents will inform, you know, more specific requests or more targeted paper, you know, I can't say that FERC has nothing or that there isn't anything there at the FERC and DOE, but you know, the request has to be reasonable and has to be targeted before we can go search an entirely separate agency that didn't even bring this suit.

THE COURT: Any response?

MR. MOCK: Yes, Your Honor. Very briefly. This is discovery. These are very targeted requests. They are very focused on the NSR issues and the turbine issues. As we started out the day, the issue on the turbine projects and on all these projects according to the government is, should Ameren have reasonably expected an emissions increase as a result of the project? For these turbine projects that which are energy efficient projects, we shouldn't have reasonably expected that, and we think that these documents will confirm that reasonableness of that belief.

THE COURT: Does your client have documents from DOE and FERC that suggest that to them?

MR. MOCK: Sitting here now, Judge, I don't know.

THE COURT: I mean, I'd be really -- I mean, that's pretty compelling.

MR. MOCK: But the fact regardless of whether we knew it, the fact that the United States government believed the same thing as Ameren, would be highly compelling evidence of the reasonableness of our belief regardless of whether or not --

MR. COONEY: But it wouldn't go to interpretation and application of NSR. EPA is the agency that interprets the law at issue or that enforces the law at issue in this case. It's the court that interprets it.

But DOE and FERC aren't a get-out-of-jail-free card that somehow enforce -- or can change how EPA enforces the Clean Air Act.

THE COURT: I'm persuaded by that argument, and I'm going to deny the motion to compel documents from DOE and FERC. Now, that's without prejudice to you coming back later and showing me that you've developed through EPA and their document production what we would normally call a chain perhaps of correspondence or emails suggesting to the contrary.

MR. MOCK: Thank you, Your Honor.

THE COURT: You don't know me, but my point about that is, is that there are some judges have said, when you

come back, say, look, we've already talked about this; don't talk to me anymore about it. I'm always happy to be convinced I was wrong or you now have document evidence or otherwise to show that that door is now open. I'm never offended by you rearguing that with new information.

MR. MOCK: We appreciate that.

THE COURT: So I want you to understand that, because you do know there are judges out there who would be pretty upset if you came back and tried it again.

MR. MOCK: I may have come across one or two.

THE COURT: Yeah, they exist. There may even be a few in this building, for all I know, Mr. Harlan. And certainly in the old days he can tell you about Judges Harper, Wangelin, Regan, and Meredith, and you would never mention -- use the same sentence twice, ever. Ever. But that's without prejudice to you finding some line of -- chain of emails or otherwise or documents suggesting to the contrary. So that motion is denied.

Now, let's go off the record.

(AN OFF-THE-RECORD DISCUSSION WAS HELD.)

MR. HANSON: Mr. Mock had mentioned that we had reneged on a commitment to produce these regional --

THE COURT: You know what the best part about me is? He'll get to prove it up, and you'll get to tell me he's wrong, and I don't take anything from it until I know more.

MR. HANSON: Right. I am just offering that Mr. Mock and I can talk first before any motion gets filed so we can sort it out.

MR. MOCK: Absolutely.

THE COURT: And you can have the courtroom the rest of the day to talk about it. Thank you, gentlemen.

MR. LAY: One quick question for you. The documents you wanted in camera, could I have till January 3 to get those to you?

THE COURT: I'm not going to read them next week. Okay.

(PROCEEDINGS CONCLUDED AT 3:35 PM.)

CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 62 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 14th day of January, 2013.

_____

/s/Shannon L. White
Shannon L. White, RMR, CRR, CCR, CSR
Official Court Reporter